

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LEON EUGENE MORRIS,
Plaintiff,

v.

D. A. TRAVIS, et al.,
Defendants.

Case No. [14-cv-05134-WHO](#) (PR)

ORDER OF DISMISSAL;

**ORDER REVOKING IN FORMA
PAUPERIS STATUS**

Dkt. No. 16

INTRODUCTION

Defendants move to dismiss as untimely plaintiff Leon Morris's civil rights suit which he brought pro se under 42 U.S.C. § 1983 against his former jailors at Salinas Valley State Prison. They also move to revoke Morris's *in forma pauperis* ("IFP") status on grounds that he has filed at least three actions that have been dismissed as frivolous or for failure to state a claim. The motion is unopposed. A response to this motion was due more than two months ago, on September 25, 2015 (a deadline set after the Court granted Morris an extension of time), but Morris has neither filed an opposition nor requested any further extension of time to file one.

Defendants are correct that Morris's decade-old claims are barred by the statute of limitations, even when time for equitable tolling is taken into account.¹ They are also correct that Morris's IFP status should be revoked. Accordingly, the motion to dismiss is GRANTED, the action is DISMISSED, and Morris's IFP status is REVOKED.

BACKGROUND

Morris's original complaint alleged 29 quite varied claims (excessive force, deprivation of due process, deliberate indifference, withholding mail) against over 30 defendants at Salinas Valley State Prison regarding events that occurred in 2004 and 2005. In its screening order, the Court dismissed without prejudice all but Morris's claim that on June 8, 2004, correctional officers R. Boccella and L. Washington violated his Eighth Amendment rights by forcing him to stand in a small cell for thirteen hours without access to food, water, or a toilet.

Morris, a state prisoner who is serving a term of 28 years to life, attempted to raise these same claims in four prior actions, one in 2005 and the other three in 2007, 2008, and 2010. *See Morris v. Woodford*, No. C 05-4677 MJJ; *Morris v. Woodford*, No. 07-4198 MJJ; *Morris v. Woodford*, No. C 08-3435 SI; and *Morris v. Travis*, No. C 10-4010 WHO. These prior attempts were unsuccessful. In the first two cases, the Court denied Morris's pauper application because he had filed at least three prior actions that had been dismissed as frivolous or malicious, or for failure to state a claim, and dismissed the action without prejudice to Morris bringing those claims in an action for which he paid the full filing fee. In the 2008 case, the Court dismissed Morris's claims against Boccella and Washington because they were not properly joined, and later dismissed the suit for failure to serve process. In the 2010 case, the Court dismissed Morris's claims against Boccella and Washington because they were not properly joined, and later dismissed the suit as untimely. (Defs.' Mot. to Dismiss ("MTD") at 3-4, Exs. B-M.)

¹ The Court recently dismissed on the same grounds another of Morris's suits (No. 10-4010 WHO).

The dismissal in the 2005 case was affirmed on appeal by the Ninth Circuit in Case No. 06-15869. The appeal of the 2007 action was dismissed by the Ninth Circuit in Case No. 08-15956. Morris did not appeal the 2008 dismissal. (*Id.* at 3-5.) The 2010 case is currently on appeal.

DISCUSSION

Defendants contend that (1) Morris's suit under § 1983 is barred by the statute of limitations, and (2) his IFP status should be revoked.

1. Statute of Limitations

Section 1983 takes its limitations period from the forum state's statute of limitations for personal injury torts, *see Wilson v. Garcia*, 471 U.S. 261, 276 (1985), which, in California, is two years as of 2003, *see Maldonado v. Harris*, 370 F.3d 945, 954 (9th Cir. 2004); Cal. Civ. Proc. Code § 335.1. This two-year statute of limitations period is tolled for two years if the plaintiff is a prisoner serving a term of less than life thus giving such prisoners effectively four years to file a federal suit. *See* Cal. Civ. Proc. Code § 352.1(a); *Azer v. Connell*, 306 F.3d 930, 936 (9th Cir. 2002) (federal courts borrow the state's equitable tolling rules if they are not inconsistent with federal law). The statute of limitations starts to run when the plaintiff's claim has accrued, that is, when he knows or has reason to know of the injury that is the basis of his action. *Two Rivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1998).

Morris's claims are barred by the statute of limitations. His claim accrued, and the statute of limitations started running, on June 8, 2004 when the prison guards allegedly confined him in a small cell. He was entitled to four years (the sum of the time allowed by the usual limitations period plus equitable tolling under section § 352.1) from that time to file suit because he is a prisoner serving a term of less than life. This means that he had until June 8, 2008, at the latest, to file suit. The suit was not filed until 2014, which is well after the 2008 deadline.

Morris's prior lawsuits do not toll the statute of limitations under either state or federal law. California treats an action dismissed without prejudice as if "no action has

1 been brought,” unless a statute specifies otherwise. *Wood v. Elling Corp.*, 20 Cal. 3d 353,
 2 359 (Cal. 1977). In an appropriate case, however, the statute of limitations might be tolled
 3 for time spent pursuing a remedy in another forum (such as state court) before filing the
 4 claim in federal court. *Cervantes v. City of San Diego*, 5 F.3d 1273, 1275 (9th Cir. 1993)
 5 (quoting *Addison v. California*, 21 Cal. 3d 313, 317 (1978)) (equitable tolling “reliev[es]
 6 plaintiff from the bar of a limitations statute when, possessing several legal remedies he,
 7 reasonably and in good faith, pursues one designed to lessen the extent of his injuries or
 8 damage.”) Morris’s action does not fall under this exception because he did not pursue his
 9 remedies in another forum before filing his federal suits.

10 Federal law provides no relief for Morris because his prior lawsuits were dismissed
 11 without prejudice, enabling him to refile at any time. “[I]f the suit is dismissed without
 12 prejudice, meaning that it can be refiled, then the tolling effect of the filing of the suit is
 13 wiped out and the statute of limitations is deemed to have continued running from
 14 whenever the cause of action accrued, without interruption by that filing.” *Elmore v.*
 15 *Henderson*, 227 F.3d 1009, 1011 (7th Cir. 2000); *O’Donnell v. Vencor, Inc.*, 466 F.3d
 16 1104, 1111 (9th Cir. 2006) (citing with approval *Chico–Velez v. Roche Prods., Inc.*, 139
 17 F.3d 56, 59 (1st Cir. 1998), which cited eight federal circuits for the rule that the statute of
 18 limitations is not tolled when a complaint containing the same claims as a later suit is
 19 dismissed without prejudice).

20 Defendants’ motion to dismiss is GRANTED. Morris’s claims are DISMISSED
 21 WITH PREJUDICE.

22 **2. Revocation of In Forma Pauperis Status**

23 Defendants contend that Morris has filed at least six prisoner lawsuits and appeals
 24 that were dismissed on grounds that they were frivolous, malicious, or failed to state
 25 claims for relief. According to defendants, these prior suits justify the revocation of
 26 Morris’s IFP status under 28 U.S.C. § 1915. (MTD at 10.)

27 A prisoner may not bring a civil action IFP under 28 U.S.C. § 1915 “if the prisoner
 28 has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an

1 action or appeal in a court of the United States that was dismissed on the grounds that it is
 2 frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the
 3 prisoner is under imminent danger of serious physical injury.” *Id.* § 1915(g). The
 4 prisoner must be given notice of the potential disqualification under § 1915(g), and
 5 defendants bear the initial burden of providing supporting documentary evidence.
 6 *Andrews v. King*, 398 F.3d 1113, 1120 (9th Cir. 2005). “Once the defendants have met
 7 this initial burden, the burden then shifts to the prisoner, who must attempt to rebut the
 8 defendants’ showing by explaining why a prior dismissal should not count as a strike.” *Id.*
 9 The prisoner bears the ultimate burden of persuasion that § 1915(g) does not bar pauper
 10 status for him. *Id.*

11 Defendants have met their burden. The Court finds that, pursuant to *Andrews*,
 12 defendants, by way of the instant motion, gave Morris notice of the potential applicability
 13 of § 1915(g). Specifically, defendants have given Morris notice that the following
 14 dismissals may be counted for purposes of § 1915(g): (1) *Morris v. Duncan*, No. C 02-
 15 00928 MJJ (N.D. Cal. May 3, 2002) (civil rights action dismissed at screening for failure
 16 to state a claim); (2) *Morris v. Woodford*, No. C 05-04677 MJJ (N.D. Cal. Apr. 18, 2006)
 17 (civil rights action dismissed without prejudice on three strikes grounds); (3) *Morris v.*
 18 *Woodford*, No. C 06-15869 (9th Cir. Jun. 20, 2007) (appeal dismissed and judgment of
 19 district court summarily affirmed on the merits); (4) *Morris v. Lushia*, No. C 00-56600
 20 (9th Cir. Apr. 16, 2001) (appeal dismissed for failure to pay filing fee); (5) *Morris v.*
 21 *Woodford*, No. C 07-04198 MJJ (N.D. Cal. Apr. 3, 2008) (civil rights action dismissed
 22 without prejudice on three strikes grounds; and (6) *Morris v. Woodford*, No. C 08-15956
 23 (9th Cir. Aug. 13, 2008) (appeal dismissed for failure to pay filing fee). (MTD, Exs. B-Q.)
 24 In a prior action the Court determined that three of these actions constituted strikes under
 25 § 1915(g).² Those strikes are (1) *Morris v. Duncan*, No. 02-00928; (2) *Morris v. Lushia*,
 26 No. C 00-56600; and (3) *Morris v. Woodford*, No. C 06-15869.

27
 28 ² Case No. 12-2480 WHO, Docket No. 33.

1 Morris, however, has not met his burden. He has not filed an opposition to the
2 motion, or otherwise shown that § 1915(g) does not bar IFP status for him. He therefore
3 may proceed IFP only if he is seeking relief from a danger of serious physical injury which
4 is “imminent” at the time of filing. *Andrews*, 398 F.3d at 1052-53. He has made no such
5 allegation or showing and therefore has not shown that he is entitled to protection under
6 the imminent danger exception. Defendants’ motion to revoke Morris’s IFP status is
7 GRANTED.

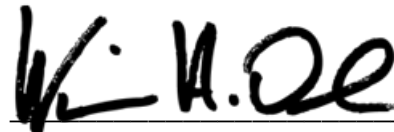
8 CONCLUSION

9 Defendants’ motion to dismiss (Docket No. 16) is GRANTED and this § 1983 suit
10 is DISMISSED WITH PREJUDICE. Their motion to revoke Morris’s IFP status is
11 GRANTED, his IFP status is REVOKED, and the order granting such status (Docket No.
12 6) is VACATED.

13 The Clerk shall terminate Docket No. 16, enter judgment in favor of defendants,
14 and close the file.

15 **IT IS SO ORDERED.**

16 **Dated:** December 14, 2015

17 

18 WILLIAM H. ORRICK
United States District Judge